STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: M.J. Cavanaugh, P.J.; H.R. Gage and B.K. Zahra, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Docket No. 125483

-vs-

RUSSELL DOUGLAS TOMBS,

Defendant-Appellee.
_____/

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JURISDICTION

Defendant-Appellee agrees with Plaintiff-Appellant's statement of the jurisdiction of this Court to review the instant case.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN LIMITING REVIEW OF THE CONVICTION TO THE PROSECUTION'S PRINCIPAL THEORY OF DISTRIBUTION OF CHILD SEXUALLY ABUSIVE MATERIAL, AS THE PROSECUTION'S THEORY THAT POSSESSION OF SUCH MATERIAL SHOULD BE EQUATED WITH PROMOTION RUNS CONTRARY TO THE EXPRESS LANGUAGE AND INTENT OF THE LEGISLATION, AND BECAUSE MR. TOMBS WAS ONLY BOUND OVER FOR TRIAL, AND THE CHARGE WAS ONLY SUBMITTED TO THE JURY, ON AN ALLEGATION THAT HE DISTRIBUTED THE MATERIAL BY RETURNING HIS COMPUTER TO COMCAST ON AUGUST 9, 2000?**

Court of Appeals answers, "No".
Plaintiff-Appellant answer, "Yes".
Defendant-Appellee answers, "No".

II. **DID THE COURT OF APPEALS CORRECTLY PRESUME THAT MCL 750.145C(3) CONTAINS A SCIENTER ELEMENT, REQUIRING THAT THE ACCUSED MUST DISTRIBUTE CHILD SEXUALLY ABUSIVE MATERIAL WITH A CRIMINAL INTENT, AS WELL AS WITH KNOWLEDGE OF THE SUBJECT MATTER OF THE MATERIAL?**

Court of Appeals answers, "Yes".
Plaintiff-Appellant answers, "No".
Defendant-Appellee answers, "Yes".

III. **DID THE COURT OF APPEALS CORRECTLY HOLD THE PROSECUTION PRESENTED LEGALLY INSUFFICIENT EVIDENCE THAT MR. TOMBS ACTED WITH THE REQUISITE CRIMINAL INTENT TO DISTRIBUTE WHEN HE TURNED THE COMPUTER BACK OVER TO HIS EMPLOYERS AT COMCAST?**

Court of Appeals answers, "Yes".
Plaintiff-Appellant answers, "No".
Defendant-Appellee answers, "Yes".

COUNTER- STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellee Russell Douglas Tombs agrees with Plaintiff-Appellant's recitation of the material proceedings and facts as set forth in their brief to this Court, with the following corrections and additions:

Christopher Williams, the first Comcast employee to look at Mr. Tombs' computer after it was returned to Comcast, admitted he could have wiped out all of the content on the hard drive and reformatted the computer with the necessary Comcast software in order to prepare the computer to give to a replacement employee for Mr. Tombs, but instead elected to look through the files on the hard drive because "he just wanted to see what was on there." (50a). He further acknowledged that Mr. Radcliffe was hired at Comcast "specifically to do erasers [sic]." (50a). He stated it was possible that Mr. Tombs, during his employment at Comcast, had done erasures of laptop computers to prepare them for other technicians. (50a). He agreed the practice at Comcast had been, with some computers, to simply erase all of the contents on the hard drive and reinstall the Comcast software. (50a). Mr. Williams acknowledged he did not tell Mr. Tombs, when he spoke to him about picking up the computer, that he was going to go through the files on the computer once it was returned to Comcast. (50a-51a).

Mr. Williams admitted that Mr. Tombs never mentioned pornography to him during Defendant's two years working at Comcast, never knew of him bringing any pornography to the workplace, and never showed him any pornographic material. (5b).

Cliff Radcliff acknowledged that the JPEG files which contained the photographs at issue were "not in a readily available locations," and were "buried inside of what's known as a user profile." (121a). He learned through his six years of computer experience how to access the

user profile and locate these files. (122a-123a). He agreed he could have "simply erased" the information on the hard drive through application of programs already installed on the computer. (123a).

Stephen Hill, when asked to describe the practice at Comcast for handling a computer that had been used by an employee and then was going to be assigned to a different employee, testified the computer would be "cleaned of any information" by use of a DOS command function that "allows us to go in and basically eradicate all information that's on – on the hard drive." (34a). Mr. Hill stated that after the DOS command was executed and all the information in the hard drive eliminated, the computer would then be reformatted for future use. (35a).

David Joseph testified he formed an "impression" that Mr. Tombs was part of an Internet club that shared child pornography. (134a-135a). Mr. Joseph admitted, however, that in the written report he prepared following his discussion with Mr. Tombs, there is no mention made of any admission by Mr. Tombs that he had shared pornography with other persons. (24b-32b).

Sgt. Joseph Duke testified that in his opinion, the fact the JPEG files containing the photos were located seven directory levels down in the computer was evidence that Mr. Tombs was intending to secret this material. (70a; 6b-7b).

Sgt. Duke admitted there was no evidence discovered that Mr. Tombs had ever sent any of the material at issue from his computer to any other computer. (8b). He further admitted he did not find any evidence that Mr. Tombs had ever actually contacted any particular usenet group or site. (109a).

During the trial, after Sgt. Duke first testified he was unaware of any wiping program installed on Mr. Tomb's Comcast computer, a special record was made concerning that testimony. Mr. Tombs gave brief testimony on this special record, for the purpose of informing

Sgt. Duke, that he had installed a wiping program on the computer, and had activated that program on August 9, seeking to eradicate the material on the computer, but did not have time to fully eliminate that material before Mr. Williams arrived to retake possession of the computer and van. (9b-20b). Following that special record testimony, Sgt. Duke examined the computer, and then testified that the wiping program was installed (he admitted he was previously unfamiliar with this program and thus had not discovered it on the computer earlier), but could not determine from the computer whether the program had been activated on August 9. (21b-23b). Sgt. Duke repeated that testimony in front of the jury when they returned to the courtroom after the special record. (113a).

The preliminary examination in the case was held on November 3, 2000, before 40th District Court Judge Joseph Craigen Oster. Mr. Joseph did not testify at the examination, and no evidence was presented at that time as to any statements Mr. Tombs allegedly made to Mr. Joseph. (2b-3b). The order binding Mr. Tombs over for trial specifically stated the date of the offenses as on or about August 9, 2000. (4b). During the instructions to the jury, Judge Chrzanowski stated they had to find the offenses occurred on or about August 9, 2000, within Macomb County. (33b).

The jury verdict form disclosed that the jury specifically convicted Mr. Tombs in Count II of using the Internet or a computer to possess child sexually abusive material, and did not convict him of using the Internet or a computer to distribute or promote child sexually abusive material. (34b-35b).

I. THE COURT OF APPEALS DID NOT ERR IN LIMITING REVIEW OF THE CONVICTION TO THE PROSECUTION'S PRINCIPAL THEORY OF DISTRIBUTION OF CHILD SEXUALLY ABUSIVE MATERIAL, AS THE PROSECUTION'S THEORY THAT POSSESSION OF SUCH MATERIAL SHOULD BE EQUATED WITH PROMOTION RUNS CONTRARY TO THE EXPRESS LANGUAGE AND INTENT OF THE LEGISLATION, AND BECAUSE MR. TOMBS WAS ONLY BOUND OVER FOR TRIAL, AND THE CHARGE WAS ONLY SUBMITTED TO THE JURY, ON AN ALLEGATION THAT HE DISTRIBUTED THE MATERIAL BY RETURNING HIS COMPUTER TO COMCAST ON AUGUST 9, 2000.

Standard of Review:

Defendant agrees with Plaintiff's statement as to the applicable standard of review.

Argument:

Plaintiff argues that the Court of Appeals erroneously limited its review of the requirements of the statute, and the sufficiency of the evidence presented to support a conviction under that statute, to the theory expressed at trial that Mr. Tombs distributed child sexually abusive material when, on August 9, 2000, he returned his laptop computer to Comcast after resigning from his employment, and that computer contained the sexually abusive material. Plaintiff claims the Court of Appeals erred in two regards, in that the Court disregarded the argument made at trial by the prosecution that the mere fact Mr. Tombs possessed such material was tantamount to promotion of that material, and thus grounds for conviction under MCL 750.145c(3), and that the Court erred in concluding that the fact the jury convicted Mr. Tombs under MCL 750.145d only for using the Internet or a computer to possess child sexually abusive material, rather than the charged offense of using the Internet or a computer to distribute or

promote such material, showed the jury did not find proof beyond a reasonable doubt that Mr. Tombs sent such material over a computer system or the Internet to any other persons.

Plaintiff's arguments were correctly rejected by the Court of Appeals. The prosecution's assertion at trial, and now on appeal, that gaining possession of child sexually abusive material is the legal equivalent to "promotion" of that material for the purposes of MCL 750.145c(3) is directly contrary to the express language and clear intent of the legislation. The jury's verdict, convicting Mr. Tombs of the lesser included offense of using a computer to possess such material, rather than using a computer to distribute or promote, does show the jury did not find sufficient proof that Mr. Tombs, on some unspecified date, sent such material to some unnamed person over the Internet. In addition, Mr. Tombs was never charged or bound over for trial on any assertion other than the claimed distribution of the material on August 9 through return of his Comcast computer, and the jury was expressly instructed by the trial court that before they could convict Mr. Tombs on any of the charged offenses, they had to find those offenses occurred on August 9, 2000. Accordingly, the claim that he was guilty of distribution because he allegedly shared such material with other persons on some unspecified date was not properly before the jury, and the verdict reflects, as the Court of Appeals panel recognized, that the jury rejected any claim other than the assertions concerning the return of the computer to Comcast.

Possession does not equate with promotion:

Plaintiff asserts the mere fact that Mr. Tombs was in possession of the child sexually abusive material, and arguably obtained possession of that material over the Internet or through

the use of a computer,[1] should equate to a finding that he promoted the material for the purposes of upholding the conviction under 750.145c(3). Acceptance of that argument would require this Court to ignore the express language of the Legislature, which clearly sets forth a graduated scheme of offenses and punishments in regards to child sexually abusive material.

In enacting the provisions of MCL 750.145c, the Legislature expressly separated the crimes of production of child sexually abusive material, distribution or promotion of the material, and possession of the material. Under 145c(3), a person who "distributes or promotes, or finances the distribution or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material" is guilty of a felony, punishable by no more that seven years in prison. Under 145c(4), a person "who knowingly possesses any child sexually abusive material" is guilty of a felony now punishable by no more that four years in prison.[2]

It is patently clear from the language of these subsections of the statute that the Legislature did not intend to equate mere possession of the material with promotion of that material. Had the Legislature intended that the customers or end users of such material were implicitly promoting the material just due to the fact of gaining possession, and thus creating a market for the material, the Legislature either would have placed the restriction on promotion in 145c(4), as an alternative to possession, or would not have created any provision in 145c(4), and

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[1] The issues raised before this Court, and previously before the Court of Appeals, concern **only** the sufficiency of the evidence of Mr. Tombs' conviction under MCL 750.145c(3). No claim was made in the appeal, nor is any claim made before this Court, that there was legally insufficient evidence to support the convictions either under MCL 750.145c(4) (possession of child sexually abusive material), or under 750.145d (use of the Internet or computer to possess child sexually abusive material). The conviction and sentence under 750.145c(3) was the only conviction and sentence vacated by the Court of Appeals' opinion. (12a-22a).

[2] The statute has been amended since the date of the charged offenses in this matter. At the time of these offenses, a conviction under 145c(4) was a misdemeanor punishable by no more than one year in a county jail, which was the sentence imposed on Mr. Tombs for his conviction under this statute.

instead have placed "possession" into 145c(3) to equate with both "distribution" and "promotion." The legislation on its face makes the mere possession of such material a different, and less severe, offense than either distribution or promotion of the material. If the prosecution's argument in the case at bar were to be accepted, the legislatively expressed distinction between "promotion" and "possession" would be effectively obliterated, and the offense of possession under MCL 750.145c(4) would cease to exist.

The role of this Court in reviewing legislation is to "ascertain and give effect to the intent of the Legislature." In re MCI Telecom Complaint, 460 Mich 396, 411 (1999). Where that intent is unambiguous on its face, the Legislature is presumed to have intended the plain meaning of its language. Lorencz v Ford Motor Co, 439 Mich 370, 376 (1992). The language of MCL 750.145c is plain and unambiguous in differentiating between "promotion" and "possession" for purposes of defining the various offenses under its provisions. Regardless of the prosecution's attempt at trial, and now on appeal, to merge those two offenses, despite the plain language of the statute, this Court cannot find that Mr. Tombs' conviction under 145c(3) can be upheld solely on the basis that he possessed child sexually abusive material.

The jury's verdict:

The Court of Appeals correctly interpreted the jury's verdict on Count II of the Information as a determination by the jury that the prosecution did not prove beyond a reasonable doubt that Mr. Tombs distributed child sexually abusive material over the Internet or through a computer system. The jury was specifically instructed they could convict Mr. Tombs either for using the Internet or a computer to distribute or promote the material, or, as a lesser offense, of using the Internet or a computer to possess the material. The verdict form clearly shows the jury rejected the charged offense and only convicted Mr. Tombs on the lesser offense

of using the Internet to possess the material. (34b-35b).[3] Had the jury found proof beyond a reasonable doubt that Mr. Tombs transmitted or shared child sexually abusive material over the Internet, they presumably would have convicted him on the charged offense under Count II, rather than on the lesser offense, which conviction was presumably based on their conclusion, pursuant to the testimony of Sgt. Duke, that the photographs found on the computer when it was turned into Comcast were obtained or downloaded from Internet web sites. The Court of Appeals' conclusion, therefore, that the conviction for distribution under 750.145c(3), which does not require any finding of use of the Internet, was premised on the prosecution's principal theory at trial – that Mr. Tombs met the definition of distribution under the statute when he transferred possession of the computer to Comcast with knowledge that the child sexually abusive material was in the computer memory.

That conclusion is buttressed by the fact that Mr. Tombs was never properly charged nor bound over for trial on any claim that he shared child sexually abusive material over the Internet on any unspecified date or with any unspecified person. Accordingly, even had the jury sought

[3] Under MCL 750.145d, the punishment for using the Internet or a computer to commit one of the enumerated offenses under the statute depends upon the statutory penalty for commission of the underlying offense. In the case at bar, the trial court, the prosecution, and Mr. Tombs' trial counsel all failed to recognize, at the time of sentencing, the impact of the jury's verdict on the lesser offense under 145d. Mr. Tombs was initially sentenced for this conviction to a ten year maximum sentence, the appropriate punishment had he in fact been convicted of using the Internet to distribute or promote the material. That error was discovered on appeal, and the Court of Appeals granted Defendant's motion for peremptory resentencing (with Plaintiff conceding the error), and Mr. Tombs was subsequently resentenced to a term with a two year maximum sentence, the proper term for use of a computer to possess the material under the statute as in effect as on the date of the charged offenses.

to support its conviction for distribution solely on the basis of the alleged admission of sharing this material made to David Joseph,[4] that conviction would have been legally invalid.

The prosecution's case at the preliminary examination only concerned the allegation involving the return of the laptop computer to Comcast on August 9, 2000. Mr. Joseph, who provided the only evidence at trial of any purported sharing of the material with unnamed persons over the Internet, did not testify at the examination. (3b). The order binding Mr. Tombs over for trial on the various counts states the offenses took place on or about August 9, 2000, the date the computer was turned over to Mr. Williams. (4b). There was no assertion made that there were any other violations of 750.145c(3) on different dates or under different circumstances. In her final instructions to the jury, Judge Chrzanowski told the jury they had to find the charged offenses occurred in Macomb County on or about August 9, 2000. (33b). There was no evidence, nor even any allegation, that Mr. Tombs distributed or shared any of the material located on his computer with anyone over the Internet on August 9.

Permitting the jury verdict on 750.145c(3) to stand based solely on the alleged admission to Mr. Joseph that on some unspecified date in the past, at some unspecified location or venue, Mr. Tombs shared child sexually abusive material over the Internet with some unspecified persons, would effectively allow the prosecution to charge and bind over a defendant on a specific offense, but then try and convict the defendant on an entirely separate offense, both in

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[4] The only evidence presented at the trial of any purported sharing of child sexually abusive material over the Internet came from the testimony of Mr. Joseph. He however admitted that his written report of the interview with Mr. Tombs contains no reference to any such admission. (24b-32b). Further, he acknowledged that his conclusion that Mr. Tombs belonged to a "club" which shared such material was an "impression" he formed during the interview, rather than any outright admission of that fact from Defendant. (134a-135a). When Sgt. Duke, the prosecution's computer crime expert, was asked by defense counsel if he found any evidence during his examination of Mr. Tombs' computer that the child sexually abusive material found in the computer memory had ever been transmitted from that computer to any other computer, he admitted there was no such evidence found. (8b). In addition, Sgt. Duke admitted he had not

time and circumstances, without having presented any evidence of that offense at a preliminary examination or getting a bind-over as to that separate offense. Michigan law is clear that the jurisdiction of a circuit court is limited to the crimes returned by the examining magistrate. See People v Curtis, 389 Mich 698 (1973). At no point of the proceedings did the prosecution seek to amend the Information to charge Mr. Tombs with any offense occurring on a date different than August 9, 2000,[5] or under circumstances different than the return of the laptop computer to Comcast. Even if they had sought to amend the Information during trial to add a different or separate count of distribution, based on Mr. Joseph's testimony, that amendment would likely have been denied under MCL 767.76, as the total lack of notice and opportunity to respond to such a change in the charge would have been highly prejudicial to Mr. Tombs.[6] See People v Sims, 257 Mich 478 (1932); People v Willett, 11o Mich App 337 (1981).

An apt analogy to this situation is where the prosecution presents evidence, under MRE 404(b), that the accused has allegedly committed similar criminal acts to the charged offense in the past. Such evidence, when allowed, cannot be used as substantive evidence that the accused committed the charged offense, but instead comes in for a limited purpose under the rule of evidence (to show intent, identity, lack of mistake, scheme or plan, etc), and certainly cannot be used to support a conviction for the commission of the prior act, in lieu of a conviction for the charged offense. While the testimony from Mr. Joseph was not sought to be admitted under MRE 404(b), it was essentially evidence only that Mr. Tombs had allegedly committed a similar

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discovered any evidence that Mr. Tombs had actually contacted any usenet group or web site that was involved with child sexually abusive material. (109a).

[5] There was no dispute at trial over the date that Mr. Tombs quit his employment and returned the computer. Mr. Joseph never testified as to any particular date or even time period during which Mr. Tombs allegedly shared material off his computer with other persons.

[6] The fact that Mr. Joseph had not made any reference in his written report of the conversation with Mr. Tombs, which report had been provided to the defense during discovery, meant the defense was taken by surprise during the trial by the allegation that Mr. Tombs had admitted to prior sharing of this type of material.

offense (distribution of child sexually abusive material) to the charged crime at some earlier date. That testimony was not evidence upon which a jury could rely in order to convict on the charged offense, which was that crime shown by the evidence produced at the preliminary examination. The circuit court had no valid jurisdiction to try Mr. Tombs on a charge that he had shared child sexually abusive material over the Internet on some unspecified date.[7]

The record is patently clear in this case that the prosecution's theory for conviction under MCL 750.145c(3) was that Mr. Tombs was guilty of distributing child sexually abusive material when he transferred possession of the computer to Comcast on August 9, 2000. Of the eight witnesses who testified for the prosecution, seven of them, comprising the vast majority of the trial evidence, testified as to the circumstances concerning the return of the computer to Comcast, and as to the material discovered on that computer. Only Mr. Joseph, disclosing for the first time at trial the allegation that Mr. Tombs had admitted to him sharing material over the Internet with others, gave evidence that did not relate to the August 9 circumstances. The Court of Appeals below was both legally and factually correct in concluding that the conviction under 750.145c(3) can only be reviewed based on that theory and evidence.

[7] As there was no testimony from Mr. Joseph of statements or evidence of exactly what material Mr. Tombs allegedly shared over the Internet, and Sgt. Duke testified he found no evidence in the computer records that the material at issue in this trial had ever been transmitted over the computer to another computer, there was no evidence in this case that even if Mr. Tombs did share some material with others over a computer, that material met the definition of child sexually abusive material sufficient for conviction under 750.145c.

II. THE COURT OF APPEALS CORRECTLY PRESUMED THAT MCL 750.145C(3) CONTAINS A SCIENTER ELEMENT, REQUIRING THAT THE ACCUSED MUST DISTRIBUTE CHILD SEXUALLY ABUSIVE MATERIAL WITH A CRIMINAL INTENT, AS WELL AS WITH KNOWLEDGE OF THE SUBJECT MATTER OF THE MATERIAL.

Standard of Review:

Defendant-Appellee agrees that this issue of statutory interpretation should be reviewed by this Court under a de novo standard.

Argument:

In their opinion below, the Court of Appeals, as a matter of first impression in the state, interpreted the statute at issue in this charge, MCL 750.145c(3), to require that the accused must distribute child sexually abusive material with both a criminal intent to make that material known to the recipient and with knowledge of the illegal subject matter of that material. That decision was both legally and logically correct, as absent the requirement of a scienter element as to the distribution allegation as well as to the knowledge of the nature of the material, the statute would punish otherwise innocent conduct, contrary to the clear intent of the Legislature, and would be constitutionally invalid.

Under the prosecution's argument in this matter, the distribution statute would be satisfied by evidence that a person merely transferred physical possession of child sexually abusive material, knowing the nature of that material, even if that person was unaware of transferring possession or did not intend the recipient of the material to recognize or see the material, unless the person was within the limited range of persons expressly exempted from prosecution for this offense under MCL 752.367. On that theory, all five of the employees of

Comcast who handled the material in this case and transferred it among themselves,[8] with knowledge of the nature of that material, before turning the computer over to the police, would be equally guilty of violating 750.145c(3), despite the lack of any criminal intent among any of the five.[9] In their brief, the prosecution expressly states "the innocent people that the Court of Appeals claims to help by adding the mens rea requirement **would not be helped** by the Court of Appeals' actions, since all of the witnesses who looked at the computer (except Williams) knew that pornography was on the computer and still looked at the images." That statement is an unambiguous assertion that these Comcast employees could and should be subject to prosecution under 750.145c(3) merely because they knew the computer contained suspected child sexually

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[8] Once the material on the computer was discovered by Christopher Williams, he transferred to the computer to Cliff Radcliffe, and then it went from Mr. Radcliffe to Stephen Hill, to Danielle Kolomyjec, and finally to Ronald Hnilica in the Human Resources department before being turned over to the police. All five of these persons were aware of the nature of the material found on the computer.

[9] The exemptions to the reach of the statute set forth in MCL 752.367 would not apply to any of the Comcast employees. That statute reads:

> Section 5 does not apply to the dissemination of obscene material by any of the following:
> (a) An individual who disseminates obscene material in the course of his or her duties as an employee of, or as a member of the board of directors of, any of the following:
> (i) A public or private college, university, or vocational school.
> (ii) A library established by this state or a library established by a county, city, township, village, or other local unit of government or authority or combination of local units of government and authorities or a library established by a community college district.
> (iii) A public or private not for profit art museum that is exempt from taxation under section 501(c)(3) of the internal revenue code.
> (b) An individual who disseminates obscene material in the course of the individual's employment and does not have discretion with regard to that dissemination or is not involved in the management of the employer.
> (c) Any portion of a business regulated by the federal communications commission.
> (d) A cable television operator that is subject to the communications act of 1934, chapter 652, 48 Stat. 1064.

These exemptions are clearly meant to exempt employees and directors in businesses that may distribute or broadcast material later found to be obscene, where that distribution or broadcasting function is part of the normal operations of the business, such as a library, educational institution, museum, or television broadcaster. It cannot be argued that Comcast was in the business of broadcasting or distributing the material at issue in this case, as Comcast served only as the Internet service provider to its customers, and is not responsible for nor produces the material available on the millions of web sites accessible through the Internet.

abusive material and still passed the computer on to their supervisors, and eventually to the police.[10] Plaintiff-Appellant's Brief at 21-22. (Emphasis added). The Court of Appeals correctly concluded there is no legislative intent behind the enactment of this statute to punish persons who acted in this fashion. The presumption of a scienter element as to the act of distribution was an appropriate and necessary interpretation of the statute to avoid this type of unintended and illogical application of the law.

Defendant agrees, as did the Court of Appeals below, with Plaintiff's assertion in their brief that the goal of an appellate court in reviewing the validity of a statute is to attempt to ascertain the intent of the Legislature. However, Defendant does not agree, nor did the Court of Appeals' panel, that either the language or the history of this statute clearly and unambiguously shows the Legislature did not intend that a scienter element apply to the act of distribution. As the Court pointed out, there are several possible definitions of the term "distribute," and most if not all of them imply a knowing and intentional act of making other persons aware of the nature of the material being distributed. (16a). Finding a degree of ambiguity in the Legislature's use of the term "distribute," particularly where the Legislature did not specifically define that term in 750.145c(1), where many of the other terms used in this statute were expressly defined, the Court correctly cited to this Court's decisions in People v Rehkopf, 422 Mich 198 (1985); and People v Adair, 452 Mich 473 (1996), for the proposition that a reviewing court should look to the object and purpose of a statute, and interpret the statute in the most reasonable manner which gives effect to that purpose and legislative intent. The Court found, with good reason, the Legislature must not have intended to punish all mere transfers of child sexually abusive material, like those

[10] Plaintiff does not explain why Mr. Williams would somehow be exempt from prosecution. He admitted at trial that he viewed some of the photos discovered on the computer prior to informing Mr. Radcliffe and turning the computer over to him. (49a).

transfers in the case at bar between the employees of Comcast, where such transfers are clearly not intended to further the production, distribution, and eventual possession of such material.

In making its ruling, the Court of Appeals relied upon several opinions of the United States Supreme Court. In Morissette v United States , 343 US 246; 72 S Ct 240; 96 L Ed 288 (1952), the Supreme Court dealt with a situation, similar to that in the case at bar, of whether a mens rea element of criminal intent should be inferred into a statute in the absence of express language within the statute requiring a finding of intent. In Morissette, the defendant was convicted of converting government property to his personal use after he took what he believed to be abandoned property (spent shell casings) from a bombing range and sold them for salvage. The defendant was convicted, despite his statements that he had no intent to steal anything but thought the property abandoned as scrap by the government, when the trial judge instructed the jury that a lack of intent to steal was not a defense to the charge.

In evaluating the statute at issue, the Supreme Court in Morissette relied upon a long-standing presumption that all crimes carry with them a requirement that the criminal act be an intentional violation of the law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

343 US at 250-251.

The Morissette Court did note that a certain subset of offenses have premised criminal liability without the need for the prosecution to show a criminal intent or mens rea, but only

where the offense at issue is a crime against the public welfare, such as regulatory offenses. However, the Court noted that these strict liability offenses "do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals." Id. at 255. The Court also noted that the variety of crimes against public welfare that do not contain the presumption of a criminal intent commonly are punished by a relatively small amount of incarceration or fine, and a conviction under these statutes "does no grave damage to an offender's reputation." Id. at 256.

Turning to the larceny statute before them, the Court in Morissette ruled that Congress, being well aware of the presumption that crimes contain an intent element, does not signal a desire to preclude a need to prove intent merely by failing to expressly place an intent element into the language of a statute:

> Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.
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> * * *
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> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.
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> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of

> centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.
>
> We hold that mere omission from sec 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

343 US at 261-263.

In Staples v United States , 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994), Justice Thomas, writing for the majority, relied upon the Morissette presumption of a requirement of criminal intent to hold that a federal statute making it a crime to possess an unregistered weapon capable of automatic firing requires the prosecution to prove beyond a reasonable doubt the accused knew of the weapon's ability to fire automatically, despite the lack of any language in the statute concerning knowledge or intent. Noting that interpretation of a statute to determine if a criminal intent is necessary for conviction requires consideration of the goals of the legislation, the Court noted that "silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element, which would require that that defendant know the facts that make his conduct illegal." 511 US at 605. Citing to United States v United States Gypsum Co., 438 US 422, 436; 98 S Ct 2864; 57 L Ed 2d 854 (1978), Justice Thomas wrote "'the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" Id. at 605. The Court concluded, based on Morissette and United States Gypsum Co., that offenses that do not require a mens rea element are disfavored, and will not be found in the absence of some express or implied indication of Congressional intent to dispense with an intent element.

The Court in Staples went on to find the firearm statute at issue was not an offense dealing with the public welfare, and thus did not fall within that narrow exception to the presumption favoring a mens rea element. The Court noted that to accept the government's position that strict liability should be imposed on anyone in possession of the type of banned weapon "would impose criminal sanctions on a class of persons whose mental state – ignorance of the characteristics of weapons in their possession – makes their actions entirely innocent." 511 US at 614-615. See also Liparota v United States , 471 US 419; 105 S Ct 2084; 85 L Ed 2d 434 (1985). The Court wrote:

> We concur in the Fifth Circuit's conclusion on this point: "It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if ... what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon."

511 US at 615.

The Court further held the serious nature of the punishment for this offense – a possible ten years in prison – was "a significant consideration in determining whether the statute should be construed as dispensing with mens rea. * * * In a system that generally requires a `vicious will' to establish a crime, 4 W. Blackstone, Commentaries 21, imposing severe punishments for offenses that require no mens rea would seem incongruous." 511 US at 616.

The rulings from Morissette , Liparota, and Staples were later applied in United States v X-Citement Video, 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994), the principal case relied upon by the Court of Appeals below to find an intent element as to the distribution prohibition in the current statute. In X-Citement Video, the Supreme Court was concerned with a statute much more similar to MCL 750.145c(3) than those at issue in the earlier cases. The statute in question makes it illegal to "knowingly transport or ship" in interstate commerce or "knowingly receives,

or distributes" any "visual depiction" if that depiction "involves the use of a minor engaging in sexually explicit conduct." 18 USC sec 2252. The precise issue presented to the Court was whether the term "knowingly" as used in the subsection also modified the phrase "use of a minor" in the remainder of the statute. In essence, the issue was whether the prosecution must prove, in a trial under this statute, that the accused both knowingly transported or distributed the material and knew the material depicted a minor engaged in the forbidden sexual activity.

Applying the presumption of a mens rea element in the absence of clear congressional intent that strict liability be imposed, the Court, per Chief Justice Rehnquist, held an element of requiring the defendant to know the nature of the material must be imputed into the statute. The Court held this interpretation of the statute was necessary "as to avoid substantial constitutional questions." 513 US at 68. The Court wrote they could not presume that Congress intended to punish persons for transporting or distributing material without knowledge of the nature of that material:

> If the term "knowingly" applies only to the relevant verbs in sec 2252 – transporting, shipping, receiving, distributing, and reproducing – we would have to conclude that Congress wished to distinguish between someone who knowingly transported a particular package of film whose contents were unknown to him, and someone who unknowingly transported that package. It would seem odd, to say the least, that Congress distinguished between someone who inadvertently dropped an item into the mail without realizing it, and someone who consciously placed the same item in the mail, but was nonetheless unconcerned about whether the person had any knowledge of the prohibited contents of the package.
>
> Some applications of respondents' position would produce results that were not merely odd, but positively absurd. If we were to conclude that "knowingly" only modifies the relevant verbs in sec 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material.

513 US at 69.

The X-Citement Video Court held the federal statute at issue was not a public welfare offense which would be exempted from the presumption in favor of a mens rea element as to the subject matter of the material. Chief Justice Rehnquist wrote "Rather, the statute is more akin to the common-law offenses against the `state, the person, property, or public morals,'" citing to Morissette. 513 US at 71. He added:

> Morissette, reinforced by Staples, instructs that the presumption in favor of a scienter requirement **should apply to each of the statutory elements that criminalize otherwise innocent conduct**.

513 US at 72. (Emphasis added).

Finally, reviewing the legislative history of this statute, the X-Citement Video majority found no express intent of Congress to apply strict liability to the issue of whether the accused knew of the illegal nature of the material. 513 US at 73-78.

The case at bar presents a statute that is similar to that at issue in X-Citement Video, except that in MCL 750.145c(3) the Legislature used the term "know[s]" only as to the nature of the material as child sexually abusive, and not in direct reference to the terms "distribute" or "promote." Even though this statute is drafted differently from the federal statute at issue in X-Citement Video, the principles expressed by the Supreme Court in that opinion, as well as in Morissette, Liparota, and Staples, equally apply to the present case. The Supreme Court in X-Citement Video expressly held the presumption in favor of a mens rea requirement applies to "each of the statutory elements." As in that case, application of the prosecution's position of strict liability – the mere showing of a physical transfer of possession of the material without any need to show a criminal intent – would lead to absurd and unintended results and the application of this serious criminal sanction to persons engaged in otherwise innocent behavior. For example, someone in knowing possession of such material would be subject to the more severe

punishment of 750.145c(3) if that person inadvertently or mistakenly puts in the material into a container belonging to a third party, or, if a computer is in use, accidentally attaches the computer file to an email to a third party instead of the file actually meant to be transmitted. While the person would be guilty of the possession of the banned material (as Mr. Tombs admittedly was in this case), the transfer of possession of that material would be neither intentional nor knowing.

A requirement of a mens rea element to the distribution element of this offense as well as to knowledge of the nature of the material, would, as the Court of Appeals below recognized, protect persons not specifically exempted by virtue of MCL 752.367 from prosecution from what they honestly believed was innocent conduct. As indicated above, the prosecution's position in this matter is that the employees of Comcast who came into possession of Mr. Tombs' computer, and knew it contained suspected child sexually abusive material, were equally guilty of distribution of this material when they transferred possession of the computer within the company. That result is absurd, and clearly outside the Legislature's intended scope of this statute. None of those persons were arguably seeking to have others in the company get possession of and/or view the material for any prurient, sexual, or financial purpose. The goal of the statutory scheme – to eliminate the production of and trafficking in child sexually abusive material – would not be advanced by prosecuting the employees of Comcast for having physically transferred possession of Mr. Tombs' computer within the company.

As with the federal statute at issue in X-Citement Video, the statute in the case at bar is not one which deals with the public welfare, or seeks punishment for violation of regulatory requirements, but instead is a felony statute, punishable by a significant prison sentence, that

deals with public morals. As such, the presumption that a criminal intent is necessary for each element of that statute applies in full.

The fact that the Legislature, in enacting 750.145c(3), did not insert the term "knowingly" as to the distribution or promotion element does not, standing alone, necessarily mean that the Legislature intended to apply a strict liability standard to any physical transfer of possession, just as the failure of the Congress to expressly modify the element of a minor engaged in sexual conduct with the term "knowingly" did not cause the United States Supreme Court in X-Citement Video to interpret 18 USC 2252 to be a strict liability statute. As the Supreme Court pointed out in Morissette, supra, it must be presumed the Legislature was aware of the long-standing presumption in favor of a mens rea element in criminal offenses, and elected to enact the statute with that in mind, in the absence of an unambiguous statement that no criminal intent is required for this statute. The Court of Appeals below, in reviewing the statutory history of 750.145c(3), noted that previously the statute required some proof of a commercial purpose or monetary gain from the distribution of the material. (19a). The Court correctly concluded the amendment of the statute to eliminate the need to prove a commercial gain (an element that clearly infers a deliberate and knowing distribution) did not signal, in the absence of any express statement from the Legislature, that the presumed mens rea element had similarly been eliminated from the statute. Instead, the retention of the terms "distribute," "promote," "finances the distribution or promotion," and "conspires, attempts or prepares to distribute, receive, finance, or promote" all describe volitional and intentional conduct, designed to further the dissemination of child sexually abusive material with the intent that the ultimate possessors of the material will be aware of its nature.

In their brief, the prosecution states, in discussing the decision in X-Citement Video, supra, that "Congress sought to punish the people who **actively** seek to give out or disperse this damaging material to other people." Plaintiff's Brief at 20. (Emphasis added). Defendant agrees that was the intent of Congress when 18 USC 2252 was enacted, and was the intent of the Michigan Legislature when they enacted the present version of MCL 750.145c(3). The statutes were and are designed to punish those persons who go beyond mere possession of the material, and "actively" seek to make others aware of the material or to promote its possession in order to increase the illegal business. The Court of Appeals' decision to infer a mens rea requirement for both elements of 145c(3) does not frustrate or contravene that legislative intent.[11] It fully implements the goal of the legislative scheme, while avoiding substantial constitutional problems with punishing what would otherwise be innocent behavior.

The ruling of the Court of Appeals below does not conflict with the decision of a different Court of Appeals panel in the unpublished Steiner opinion appended to the prosecution's brief. The sufficiency of the evidence issue raised in Steiner did not concern whether MCL 750.145c(3) contains a mens rea element, but instead concerned the identity of the person who distributed child sexually abusive material to an undercover police officer. There is no discussion in the opinion concerning the question before this Court. The fact the panel paraphrased the statute in briefly stating what had to be proven to convict under 750.145c(3) does not mean that the Steiner panel ruled upon, or even considered, the issue of whether the prosecution must prove that the distribution was intentional or knowing. Given the brief

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[11] The legislative history included by Plaintiff in their appendix does not contain any express statement that a strict liability standard is to be applied to the distribution element of 750.145c(3). The amendments discussed in the history concern the addition of the possession subsection, and to increase the statutory punishments for producing and distributing child sexually abusive material. Those amendments are not relevant to the issue before this Court, except for the consideration that a more severe punishment for distribution only adds to the

summary of the facts presented to the jury in Steiner, it seems quite unlikely the defense challenged the sufficiency of the evidence to prove an intentional distribution, as compared to a challenge to the evidence that Mr. Steiner was the person responsible for the distribution.

The Court of Appeals in the case at bar correctly interpreted MCL 750.145c(3) as a statute that concerns the public morals, as does the similar federal statute at issue in X-Citement Video, supra, and accordingly applied the long-standing presumption that in the absence of a clear and unambiguous expression from the Legislature that this statute is a strict liability provision, a criminal intent requirement applies to all of the elements of the charge. That decision directly tracks the history and rationale of the United States Supreme Court in the Morissette, Staples, Liparota, and X-Citement Video decisions. The decision is consistent with the intent of the Legislature to punish more severely persons who not only possess child sexually abusive material, but intentionally distribute or promote that material to others to further this illegal business, while at the same time protects persons, like the employees at Comcast, who do transfer physical possession of the material but with innocent justification. The decision avoids substantial constitutional problems with the statute. This Court should uphold that decision, and reject the prosecution's assertion that all that is necessary for conviction under the statute is any transfer of possession of the material with knowledge of the nature of that material.

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presumptions that (1) the statute is not a public welfare legislation, and (2) a mens rea element should be presumed.

III. THE COURT OF APPEALS CORRECTLY HELD THE PROSECUTION PRESENTED LEGALLY INSUFFICIENT EVIDENCE THAT MR. TOMBS ACTED WITH THE REQUISITE CRIMINAL INTENT TO DISTRIBUTE WHEN HE TURNED THE COMPUTER BACK OVER TO HIS EMPLOYERS AT COMCAST.

Standard of Review:

Defendant-Appellee agrees that an appellate court reviews the sufficiency of the evidence presented at a trial under a de novo standard.

Argument:

The final question before this Court is whether the prosecution presented legally sufficient evidence that Mr. Tombs distributed the child sexually abusive material to his employers at Comcast with the requisite criminal intent concerning the distribution. It should be noted again that Mr. Tombs never challenged the sufficiency of the evidence that he was in knowing possession of child sexually abusive material. The prosecution's repeated descriptions of the content of the exhibits admitted at trial are legally irrelevant to the questions before this Court, as no claim has been made nor is being made here that the photos discovered on the computer, first by Mr. Williams and later by the other persons who examined the computer, met the statutory definition of child sexually abusive material, nor has any claim been made that Mr. Tombs was unaware of the presence of those materials in the computer. The sole question, assuming that this Court agrees with Defendant and the Court of Appeals that a mens rea requirement exists in the statute as to the distribution or promotion element, is whether the prosecution proved Mr. Tombs intended to distribute that material to anyone at Comcast.

Even viewed in a light most favorable to the prosecution, the trial evidence failed to provide sufficient grounds for a rational trier of fact to conclude, beyond a reasonable doubt, that

Mr. Tombs acted with criminal intent to distribute when he returned the computer to Comcast.[12] Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); People v Hunter, 466 Mich 1 (2002). The failure to present legally sufficient evidence under this standard means the conviction violated Mr. Tombs' right to due process of law. US Const, Amends V, XIV.

Had Mr. Tombs intended to distribute or promote the child sexually abusive material to persons at Comcast, he would have taken some steps to inform the persons of the existence of the material on the computer. The prosecution failed to present any evidence that Mr. Tombs made anyone at Comcast aware, or even attempted to make them aware, of the presence of the illegal material. To the contrary, **all** of the trial evidence indicated that Mr. Tombs neither intended nor expected anyone at Comcast would discover or view the material.

Mr. Williams, the man who contacted Mr. Tombs about picking up the computer and was the first person to look through the computer once he got it back to Comcast, acknowledged at trial that Mr. Tombs had never, either on August 9 nor at any other time, shown him any pornography or discussed pornography with him, and admitted he had never seen Mr. Tombs in possession of any pornography while employed for Comcast. (5b). The Comcast employees who examined the computer all acknowledged the computer hard drive could have been erased and the computer reformatted with the basic Comcast software, in preparation for giving that computer to a replacement technician, without any need to review any of the files or determine if any personal material was left in the computer by Mr. Tombs. Mr. Williams admitted that had been the practice at Comcast, that Mr. Tombs may in fact have previously worked at such

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[12] The trial record shows that the jury was never required by the trial court to determine whether there was criminal intent. The trial judge never instructed the jury they had to find Mr. Tombs intentionally distributed the material to the persons at Comcast, even after the jury specifically sent out a question, during deliberations, asking whether they had to find that the distribution was intentional. (16a). At a minimum, even if this Court finds that sufficient evidence of intent was presented by the prosecution, the matter must be remanded for a retrial in that the jury was

erasures of hard drives on returned computers, and that Mr. Radcliffe was hired at Comcast to do erasures. (50a). He testified that instead of erasing or wiping clean the hard drive on the computer Mr. Tombs returned, he looked through the files because "I just wanted to see what was on there," and not because that action was required or necessary to do his job. (50a). Mr. Williams further testified he did not tell Mr. Tombs, when he was arranging to pick up the computer, that he was intending to look through the files rather than merely erasing all the contents and starting over with fresh software. (50a-51a).

Stephen Hill similarly acknowledged that the practice at Comcast had been to wipe the hard drives of all information and reformat. (34a-35a).

Given this testimony, it is reasonable to assume that Mr. Tombs anticipated that no one at Comcast would go through the files in the computer, but instead the entire hard drive would be wiped clean and the computer reformatted before being given out to a different employee. Mr. Joseph in fact testified that in his discussion with Mr. Tombs, Defendant expressly told him he expected the computer would be wiped clean without the need for anyone to search through the files looking for personal material. (132a-133a). There was no admission by Mr. Tombs to Mr. Joseph, or to anyone else, that he intentionally left the material in his computer seeking or wanting to have persons at Comcast discover and/or access that material.

The other evidence in the case similarly supported the conclusion of the Court of Appeals that Mr. Tombs did not transfer possession of the child sexually abusive material with a criminal intent to distribute or promote that material. Mr. Radcliffe acknowledged the photos were buried deep in a "user profile," and agreed they thus were not in "readily available locations." (121a). Sgt. Joseph Duke testified that in his opinion, the fact the JPEG files containing the photos were

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never instructed upon, and thus never found beyond a reasonable doubt, that the intent element was proven.

located seven directory levels down in the computer was evidence that Mr. Tombs was intending to secret this material. (70a; 6b-7b).

This record shows that Mr. Tombs had no intent, nor any expectation, that anyone at Comcast would discover or access the child sexually abusive material files in the computer. The intent of the Legislature in enacting MCL 705.145c(3) was to prevent persons in possession of such material from knowingly distributing that material, or promoting its possession by others, for the purposes of making third persons aware of the content of the material. It is highly unlikely that had Mr. Tombs actually intended that persons at Comcast view the material, he would have utterly failed to mention that material to Mr. Williams or anyone else, and would have secreted the material in a location not readily available or obvious to anyone who examined the computer. Instead, the record fully supports the Court of Appeals' conclusion that Mr. Tombs, unable to fully erase or wipe clean this material in the short time available to him after Mr. Williams told him he had only an hour to return the computer, relied on his experience and knowledge of the Comcast practices to assume the hard drive would be wiped clean, and that no one would seek to review any individual files prior to this erasure. Neither the direct nor the circumstantial evidence in the case would have permitted the jury, had they been instructed that criminal intent was a requisite element, to find beyond a reasonable doubt that Mr. Tombs intended to distribute or promote this material to persons at Comcast. All the prosecution proved at this trial was that Mr. Tombs had knowing possession of the material, and physically transferred that possession to Comcast with no intent or anticipation that his prior employers would discover or view the photographs. That proof did not legally support the conviction under MCL 750.145c(3).

As to the prosecution's claim that, in the alternative, they presented legally sufficient evidence at trial that Mr. Tombs shared child sexually abusive material over the Internet, Defendant has already argued that this claim was both outside the valid scope of this prosecution, and was not supported by the evidence. Mr. Tombs was never bound over for trial on that allegation, nor was the jury instructed they could convict him for a distribution or promotion of the material on any date other than August 9, 2000. There was no evidence discovered in the examination of the computer by the experts that Mr. Tombs ever transmitted the material from his computer to other computers, and no evidence that he ever actually communicated with a "usenet" group. Mr. Joseph never memorialized the alleged statement by including it in his written report of his interview with Mr. Tombs. Finally, the prosecution was not able to prove, or present any evidence, as to the exact nature of the material allegedly shared over the Internet, and thus could not meet their burden of proof, under MCL 750.145c(3), that Defendant actually distributed child sexually abusive material at some unspecified date and location.

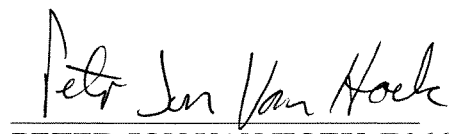
This Court should uphold the conclusion reached by the Court of Appeals below that the prosecution failed to meet the Jackson v Virginia standard for sufficiency of the evidence, and affirm the reversal of the conviction and sentence under 750.145c(3) and the dismissal of that charge. In the alternative, at a minimum the matter should be remanded for a new trial on that charge, in that the jury was never instructed as to the essential element of a criminal mens rea concerning the distribution.

SUMMARY AND RELIEF SOUGHT

Defendant-Appellee asks this Honorable Court to affirm the decision of the Court of Appeals, or, at a minimum, remand the matter for a new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

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